STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LANCASTER EDUCATION ASSOCIATION, JOSEPH PAHR and RICHARD RICH, Complainants, vs. LANCASTER JOINT SCHOOL DISTRICT NO. 3 and BOARD OF EDUCATION OF LANCASTER JOINT SCHOOL DISTRICT NO. 3, Respondents.	Case I No. 18297 MP-397 Decision No. 13016-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of the Complainants.

Ela, Esch, Hart and Clark, Attorneys at Law, by Mr. Ronald J. Kotnik, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Lancaster Education Association, Joseph Pahr and Richard Rich having filed a complaint with the Wisconsin Employment Relations Commission alleging that Lancaster Joint School District No. 3 and the Board of Education of Lancaster Joint School District No. 3 have committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 111.70(3)(a)4 and 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed George R. Fleischli, a member of its staff to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Lancaster, Wisconsin, on October 29, 1974, before the Examiner and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Lancaster Education Association, hereinafter referred to as the Complainant Association, is a labor organization which has been at all times material herein the exclusive bargaining representative of teachers employed by Lancaster Joint School District No. 3.

2. That Complainant Joseph Pahr, hereinafter referred to as Complainant Pahr or Pahr, is a teacher who was employed by Lancaster Joint School District No. 3 during the 1972-73 and 1973-74 school years; that Pahr's responsibilities at that time consisted of head football coach, assistant track coach and instructor of physical education and health, all of which responsibilities were performed at the High School; that Pahr is currently employed by Lancaster Joint School District No. 3 and his responsibilities are that of assistant athletic director, track coach and instructor of physical education and health, all of which responsibilities are now performed at the Junior High School.

3. That Complainant Richard Rich, hereinafter referred to as Complainant Rich or Rich, was a teacher employed by Lancaster Joint School District No. 3 from August of 1966 through June of 1974; that during the 1973-74 school year Rich's responsibilities were that of science teacher and assistant football coach at the Junior High School and assistant basketball coach at the High School; that Rich held the position of assistant basketball coach at the High School for four consecutive years; that Complainant Rich is currently employed by the Cochrane-Fountain City Community Schools and his responsibilities include that of social studies teacher in the seventh and eighth grades and head basketball coach at the High School.

4. That Respondent Lancaster Joint School District No. 3, hereinafter referred to as the Respondent District and Respondent Board of Education of Lancaster Joint School District No. 3, hereinafter referred to as the Respondent Board are, respectively, a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of Wisconsin with the management, supervision and control of the Respondent District and its affairs.

5. That at all times material herein Complainant Association and the Respondent Board were signators to a collective bargaining agreement effective for the 1973-74 school year covering wages, hours and other conditions of employment of teachers in the employment of the Respondent District and that said agreement contained the following provisions relevant herein:

> "The School Board, on its own behalf, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules, and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:
>
> (1) To the executive management and administrative control of the school system and its properties, programs and facilities, and the professional duties of its employees;
>
> (2) To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications, their dismissal or demotion, their promotion and their work assignment;
>
> (3) To establish policies for the program of instruction and to make necessary assignments for all programs of an extra-curricular nature that, in the opinion of the Board, benefit students; the professional staff will be consulted in this policy development.
>
> (4) To determine means and methods of instruction, in consultation with the professional staff in an advisory capacity. This process will continue with the selection of textbooks and other teaching materials, classroom aids and class schedules.
>
> The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and Wisconsin Statutes, Sec. 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Constitution and Laws of the State of Wisconsin, and the Constitution and Laws of the United States.

. . .

16. Grievance Procedure:

A grievant may be a teacher, group of teachers or the Association.

A grievance involving a teacher's wages, hours or conditions of employment or the interpretation, or application of the provisions of this agreement or Board Policies shall be processed in the following manner. The Association has the right to be present at each step of the proceedings.

a. An earnest effort shall first be made to settle the matter informally between the teacher(s) and the principal. A decision shall be rendered in writing and given to the grievant.

b. If the matter is not resolved, the grievance shall be presented, in writing, to the principal with the request that a written answer be given within ten (10) school days.

c. If the matter is not satisfactorily resolved at step (b), the grievant or the building representative shall forward copies of the grievance to the principal, to the district administrator and to the Association with the request that within five (5) school days, the district administrator meet with the grievant and the Association to attempt to resolve the grievance. The district administrator shall give his written answer to the grievant and the Association within five (5) school days of this meeting.

d. If the grievance is not resolved at step (c), the Association or the grievant may, within five (5) school days, submit the written grievance to the School Board. The Board shall promptly schedule a private conference. If matters are not resolved at the private conference, the teacher may request a private hearing with the Board within ten (10) school days.

At the hearing, the teacher has the right to know the allegation against him, the right to counsel and the right to confront and cross-examine witnesses. Any allegation cannot be wholly without basis in fact, nor wholly unreasoned, nor wholly inappropriate, nor impermissibly based such as in the case of constitutionally protected rights.

The foregoing procedure shall not preclude an individual from processing a grievance without the assistance of the Association. If a grievant shall decide to process a grievance independently of this procedure, the Association shall be informed at each step and the settlement and disposition of such grievance.

. . .

19. Policy Revisions: Any revisions in School Board Policies which pertain to wages, hours and conditions of employment for the professional staff shall be negotiated between the Lancaster School Board and the Lancaster Education Association.

20. Just Cause: No teacher shall be discharged, non-renewed, reduced in rank or compensation without just cause."

6. That on February 26, 1973, Pahr met with a committee consisting of three members of the Respondent Board, which meeting was called by said committee; that at said meeting the committee expressed certain criticism of Pahr's performance as head football coach; that although the criticism presented by these Board members to Pahr, was

expressed in general terms, it focused, inter alia, on the team's losing record, the conditioning of athletes and the management of the team's personnel.

7. That after February 26, 1973 and before February 2, 1974 no one acting on behalf of the Respondent District discussed Pahr's performance as head football coach with him; that in a conversation with David Welter, Superintendent of the Respondent District, which was initiated by Welter and occurred in Welter's automobile on February 2, 1974, Welter advised Pahr that it was Welter's intent to recommend that Pahr not be renewed as head football coach for the 1974-1975 season; that during this conversation, Welter criticized Pahr's performance as head football coach; that although Welter's criticism was also expressed in general terms, it focused, inter alia, on offensive line blocking, the organization of practices and, possibily, the conditioning of players.

8. That thereafter Welter invited Pahr to attend a meeting of the Respondent Board scheduled for February 13, 1974; that Pahr did not attend the meeting on February 13, 1974 and Welter thereafter asked him to attend a meeting of the Respondent Board on February 18, 1974; that Pahr attended a portion of the meeting on February 18, 1974; that during said portion of the meeting, certain members of the Respondent Board discussed certain aspects of Pahr's performance as head football coach with which they were dissatisfied; that although much of this criticism was also expressed in general terms, it focused, inter alia, on the number of plays employed, the conditioning of players, the organization of practices and the quality of offensive line blocking; that although Pahr knew or should have known that the Respondent Board intended to discuss his performance as head football coach because of Welter's recommendation that he be non-renewed as head football coach, Pahr was not advised prior to said meeting that the Respondent Board intended to act on whether to renew or non-renew his assignment as head football coach at the conclusion of said meeting; that subsequently, after Pahr had left said meeting, the Respondent Board voted to non-renew Pahr as head football coach at the Senior High School; that on the following day during a telephone conversation initiated by Pahr for another purpose, Welter advised Pahr that the Respondent Board had voted to non-renew him as head football coach at the Senior High School.

9. That prior to February 18, 1974, it had been the policy of the Respondent Board to provide a statement of reasons when giving notice of non-renewal or consideration of non-renewal pursuant to Section 118.22 of the Wisconsin Statutes; that during the meeting of February 18, 1974, the Respondent Board had under consideration the possible non-renewal of the employment contract of one of the District's administrators not included in the Complainant Association's bargaining unit; that in the process of deciding what reasons, if any, should be stated in the notice of consideration for non-renewal to be sent to said administrator pursuant to Section 118.22 of the Wisconsin Statutes, the Respondent considered and adopted the following new policy:

> ". . . that in the case of non-renewals or consideration of non-renewal of contracts, the employees of the District shll [sic] not be furnished with a statement of reasons for non-renewal."

That the Respondent Board unilaterally adopted this policy revision without prior notification to the Complainant Association of its intent to do so and did not offer to bargain or bargain with the Complainant Association concerning this change in policy.

10. That during the 1973-1974 school year, the Respondent District employed approximately 17 teachers who were assigned co-curricular duties as assistant coaches; that certain members of the Respondent Board had, for some time, been concerned about those assistant coaches, at least three in number, who were assigned assistant coaching duties at a building which was different than the one in which they taught thereby requiring their immediate departure from the building in which they taught at the end of the class day; that this concern was discussed by the Respondent Board during an executive session at a meeting held on March 14, 1973 which is reflected in the minutes of said executive session which were "not for public distribution" and read in relevant part as follows:

> "2. COACHING ASSIGNMENTS: The assignments of junior high school teachers now serving as assistant coaches at the senior high school were reviewed. It was decided that present assignments could not be changed but changes will be considered for the 1974 - 1975 school year. Assistant coaches are to be advised of this possibility for another contract year."

That although it was the Respondent Board's intent, as reflected in said minutes, that the assistant coaches be advised of the possibility of a change of assignments in the 1973-1974 school year, Pahr was never advised of such a possibility prior to March 11, 1974; that at a special meeting held on March 11, 1974 which was called without prior notification to the public or the Complainant Association, the Respondent Board considered and adopted a policy regarding the appointment of assistant coaches which read in relevant part as follows:

> ". . . there was a motion by Dr. Hillary, seconded by Mr. Noble that all assistant coaches will not be appointed out of the building that they are teaching in. The motion carried."

That the Respondent Board unilaterally adopted this policy change without prior notice to the Association of its intent to do so and did not offer to bargain or bargain with the Complainant Association concerning this policy change; that at a regular Board meeting held on March 13, 1974, the Respondent Board considered and decided to send out letters of intent to renew the teaching contracts of those teachers who were returning to teach during the 1974-1975 school year and to note thereon certain changes in co-curricular assignment; that the minutes of said meeting reflect that said changes included the following:

> ". . .
>
> Richard Rich - Delete J.V. Basketball at Senior High
>
> . . .
>
> Joe Pahr - Delete Head Football Coach and assign Boys Physical Ed. & Health at Junior High. Delete Assistant Track.
>
> . . ."

11. That the Respondent Board sent letters of intent returnable on or before April 15, 1974 containing the aforementioned assignment changes to both Pahr and Rich; that both Pahr and Rich signed and returned the letters of intent within the required time; that, however, they each reserved the right to challenge the assignment changes through the initiation of grievances.

12. That Pahr grieved the changes of his teaching and co-curricular assignments pursuant to the grievance procedure set forth in the collective bargaining agreement which grievance read in relevant part as follows:

"STATEMENT OF GRIEVANCE:

The following grievance is presented in compliance with step (b) of the Grievance Procedure, Item 16, page 8, of the Collective Bargaining Agreement, adopted by the parties 5/13/73.

1. Mr. Pahr has been notified that due to Board of Education action he has been nonrenewed as head football coach. The aforesaid action is in violation of the collective bargaining agreement Item 20, Just Cause: No teacher shall be . . ., reduced in rank or compensation without just cause.
2. The policy revision which the Board of Education has recently adopted which prohibits Junior High staff from coaching Senior High activities is in violation of the collective bargaining agreement, Item 19, Policy Revisions: Any revisions in School Board Policies which pertain to wages, hours and conditions of employment for the professional staff shall be negotiated between the Lancaster School Board and the Lancaster Education Association.
3. Such (a) violation(s) of the Collective Bargaining Agreement between the Board of Education and Lancaster Education Association constitute Prohibitive Practice(s) under Wisconsin S. 111.70 (3) 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment.
4. The Board of Education action to reassign Mr. Pahr to the Junior High School is arbitrary and capricious and has a very intimate effect upon Mr. Pahr's conditions of employment and therefore is a grievable issue as defined by the grievance procedure Item 16 (paragraph 2) wages, hours or conditions of employment.

ACTION REQUESTED:

1. That Mr. Pahr be reinstated to his former position as teacher at the Senior High School.
2. That Mr. Pahr be reinstated to his former position as head football coach at the Senior High School.
3. That any and all previous benefits of employment previously enjoyed by Mr. Pahr be reinstated immediately."

That Pahr's grievance was refused at the first three steps of the grievance procedure on the grounds that it did not raise a grievable issue.

13. That Rich grieved the loss of his basketball coaching position pursuant to the grievance procedure set forth in the collective bargaining agreement which grievance read in relevant part as follows:

"Statement Of Grievance:

The following grievance is presented in compliance with step (B) of the grievance procedure, item 16, page 8, of the collective bargaining agreement, adopted by the parties 5/13/73.

1. Mr. Rich has been notified that due to a recent change in policy by the Lancaster Board Of Education he has been nonrenewed as junior varsity basketball coach. The

aforesaid action is in violation of the collective bargaining agreement item 20, Just Cause: No teacher shall be . . . reduced in rank or compensation without Just Cause.

2. Such (a) violation(s) of the collective bargaining agreement between the Board Of Education and the Lancaster Education Association constitute Prohibitive Practice(s) under Wisconsin S. 111.70 (3) 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment.
3. That the arbitrary action by the board in deleting the basketball coaching position constitutes a breach of contract on the part of the Board under the agreement negotiated between the Lancaster Education Association and the Board Of Education: No. (19) Policy Revisions: Any revisions in School Board Policies which pertain to wages, hours and conditions of employment for the professional staff shall be negotiated between the Lancaster School Board and the Lancaster Education Association.
4. That the arbitrary and capricious action of the Board in changing the teacher's assignment shall have a detrimental effect upon wages, hours and conditions of employment and therefore is a grievable issue as defined by the collective bargaining agreement item 16 (paragraph 2) wages, hours and conditions of employment.

Action Requested:

1. That Mr. Rich be reinstated to his former position as junior varsity basketball coach in the District.
2. That any and all benefits of employment previously enjoyed by Mr. Rich be reinstated immediately."

That Rich's grievance was refused at the first three levels on the grounds that it did not raise a grievable issue.

14. That by letter dated May 9, 1974 from Welter to Maurice Clark, President of the Complainant Association, Welter informed Clark that the Respondent Board was then willing to process the grievances filed by Pahr, Rich and others and that the action could be initiated at any step in the grievance procedure; that the Complainant Association thereafter filed a single grievance at the fourth step of the grievance procedure on behalf of Pahr, Rich and others; that on May 30, 1974, the Respondent Board conducted a private conference with the Complainants pursuant to the fourth step of the grievance procedure; that the Respondent Board denied said grievance; that at this conference the Respondent Board refused to provide Pahr with the specific reasons underlying their decision to remove him as head football coach at the Senior High School.

15. That in the interim, on May 28, 1974, Complainant Rich had voluntarily submitted a letter of resignation to the Respondent Board; that Rich's resignation was motivated by his belief that even if he prevailed in his grievance, a year away from coaching basketball during the pendency of his grievance might harm his coaching career; that although the Respondent Board had not sought to cause Rich to resign, it accepted his resignation at its meeting on May 30, 1974.

16. That thereafter, during the first part of June, Complainant Rich met with Welter and asked Welter whether he would recommend to the Respondent Board that Rich be reinstated to his prior teaching position; that Welter informed Rich that he would make such a recommendation if Rich would submit a letter to the Respondent Board

requesting reinstatement; that Rich did not submit such a letter to the Respondent Board and consequently, Welter never made such recommendation to the Respondent Board; that the issue of Rich's coaching position was not discussed at this meeting; that at the time Welter would not have recommended that Rich be reinstated as assistant basketball coach because such a recommendation would have been contrary to the Respondent Board's policy of limiting assistant coaches to coaching activities conducted out of the building in which they teach.

17. That at a meeting of the Respondent Board on June 12, 1974, Welter recommended that the Respondent Board reconsider its policy restricting assistant coaches to the buildings in which they teach; that at this meeting, the Respondent Board reconsidered and rescinded said policy; that in reconsidering and rescinding said policy, the Respondent Board was seeking to avoid a possible violation of its duty to bargain with regard to said policy and did not intend to change the practice contemplated by said policy; that the Respondent Board acted unilaterally in rescinding said policy without giving prior notification to the Complainant Association of its intent to do so or its reasons therefore and it did not offer to bargain with the Complainant Association concerning said decision.

18. That on June 27, 1974, the Respondent Board conducted a private hearing with the Complainants pursuant to the fifth step of the grievance procedure; that at this hearing, the Respondent Board again refused to provide Pahr with the specific reasons underlying his removal from the head football coaching position; that the Respondent Board denied the Complainants' grievance.

19. That during the 1973-1974 term, Pahr received total compensation of $11,395 for his teaching and coaching activities; that Pahr's compensation for the term was comprised of a base salary of $10,345, $750 for his head football coach position and $300 for his assistant track coach position; that Pahr received a total compensation of $11,497 for his teaching and coaching activities during the 1974-1975 school year; that Pahr's compensation for this term was comprised of a base salary of $10,947, $250 for his position as assistant athletic director and $300 for his position as Junior High track coach; that had Pahr maintained the same positions in 1974-1975 as he had held in 1973-1974, Pahr would have received a total compensation of $11,997 for the 1974-1975 school year.

20. That during the 1973-1974 school year, Rich received a total compensation of $9,809 for his teaching and coaching activites; that Rich's compensation for that year was comprised of a base salary of $9,059, $300 for his assistant football coach position and $450 for his assistant basketball coach position at the High School; that had Rich remained with the Lancaster Joint School District for the 1974-1975 school year with his assistant football coach position but without his assistant basketball coach position, Rich would have received a total compensation of $10,094; that had Rich remained with Lancaster Joint School District for the 1974-1975 school year and maintained the same positions in that year as he had held during the prior year, Rich would have received total compensation of $10,544; that during the 1974-1975 school year, Rich received a total compensation of $10,800 from the Cochrane-Fountain City Community School for his teaching and coaching activities; that Rich's compensation for this term was comprised of a base salary of $9,175, $800 for carrying an extra teaching load and $825 for his position as basketball coach.

21. That Article 20 of the 1973-1974 collective bargaining agreement set out in Finding number five above accurately reflects the language that the parties agreed to when Article 20 was first incorporated into the collective bargaining agreement in the negotiations that preceded the 1972-1973 collective bargaining agreement.

Upon the basis of the above and foregoing Findings of Fact the Examiner makes the following

CONCLUSIONS OF LAW

1. That, by the action of the Respondent Board of unilaterally adopting a policy of not furnishing a statement of reasons in cases of non-renewals or consideration of non-renewal without giving prior notification to the Complainant Association of its intent to do so, or offering to bargain or bargaining with the Complainant Association with regard to said policy revision, the Respondent District violated its duty to bargain in good faith as defined in Section 111.70(1)(d) of the MERA and committed prohibited practices within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the MERA.

2. That, by the actions of the Respondent Board of unilaterally adopting a policy of not appointing teachers represented by the Complainant Association to assistant coaching positions outside of the building in which they teach, without giving prior notification to the Complainant Association of its intent to do so or offering to bargain or bargaining with the Complainant Association with regard to said policy revision, the Respondent District violated the provisions of Article 19 of the collective bargaining agreement and committed a prohibited practice within the meaning of Section 111.70(3)(a)5 of the MERA and violated its duty to bargain in good faith as defined in Section 111.70(1)(d) of the MERA and committed prohibited practices within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the MERA.

3. That, by the action of the Respondent Board of acting to rescind the revised policy adopted on March 11, 1974, of not appointing teachers represented by the Complainant Association to assistant coaching duties outside of the building in which they teach, for the purpose of attempting to avoid its duty to bargain with regard to said revised policy Respondent District violated its duty to bargain in good faith as defined in Section 111.70(1)(d) of the MERA and committed prohibited practices within the meaning of Section 111.70(3)(a)4 and Section 111.70(3)(a)1 of the MERA.

4. That, by the action of the Respondent Board of refusing to give Complainant Pahr notice of the specific reasons why it had non-renewed his co-curricular assignment as head football coach and otherwise depriving of him of the opportunity to participate in a hearing as contemplated by the penultimate paragraph of Article 16 of the collective bargaining agreement, the Respondent District violated the provisions of Article 16 and Article 20 of the collective bargaining agreement and committed prohibited practices within the meaning of Section 111.70(3)(a)5 of the MERA.

5. That, by the action of the Respondent Board of deleting Complainant Rich's co-curricular assignment as assistant basketball coach at the Senior High School and Complainant Pahr's co-curricular assignment as assistant track coach at the Senior High School, pursuant to its policy of not appointing teachers represented by the Complainant Association to assistant coaching duties outside of the building in which they teach, which policy was unilaterally adopted in violation

of Article 19 of the collective bargaining agreement, the Respondent violated Article 20 of the collective bargaining agreement and committed prohibited practices within the meaning of Section 111.70(3)(a) 5 of the MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that Respondent Lancaster Joint School District No. 3, its officers and agents, shall immediately:

1. Cease and desist from unilaterally changing School Board policies which pertain to wages, hours and conditions of employment of employes represented by the Lancaster Education Association without first notifying said Association of the proposed change and offering to bargain and, if requested, bargaining with said Association concerning the proposed change.

2. Take the following affirmative action which the Examiner finds will return the parties to the status quo ante and otherwise effectuate the purposes of the Municipal Employment Relations Act:

   (a) By resolution of the Respondent Board either rescind the policy adopted by the Respondent Board at its February 18, 1974 meeting which is set out in Finding of Fact number nine above or revise said policy to clearly indicate that it does not apply to employes represented by the Lancaster Education Association.

   (b) By resolution of the Respondent Board rescind the policy adopted by the Respondent Board at its March 11, 1974 meeting which is set out in Finding of Fact number ten above and indicate as part of said resolution that said policy will not be followed in practice.

   (c) Offer Complainant Joseph Pahr reinstatement to his duties as head football coach, assistant track coach and instructor of physical education and health at the High School by tendering him an individual teaching contract for the performance of said duties during the 1975-1976 school year, and, if he accepts said contract, reinstate him to said duties during the 1975-1976 school year. In addition, offer to make Pahr whole for the compensation that he lost during the 1974-1975 school year by paying him the sum of $500.

   (d) Notify all of its employes represented by the Lancaster Education Association of its intent to comply with the Order herein by posting in a conspicuous place in each of the schools operated by it, a copy of the notice attached hereto and marked "Appendix A". Such notices shall be signed by the President of the Respondent Board and shall be posted after the beginning of the regular school term and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered defaced or covered by any other material.

(e) Notify the Commission within twenty (20) days of the date of this Order as to what steps it has taken to comply with said Order.

Dated at Madison, Wisconsin this 26th day of June, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES REPRESENTED BY THE
LANCASTER EDUCATION ASSOCIATION

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all employes represented by the Lancaster Education Association that:

WE WILL rescind [or revise] the policy, adopted at our February 18, 1974 meeting, of not providing a statement of reasons for non-renewal in the case of non-renewals or consideration of non-renewal of contracts and WE WILL continue the policy of providing a statement of reasons in such cases to employes represented by the Lancaster Education Association.

WE WILL rescind the policy, adopted at our March 11, 1974 meeting, of not appointing assistant coaches to coaching assignments outside of the building in which they teach and WE WILL NOT follow said policy in practice.

WE WILL NOT hereinafter refuse to bargain with the Lancaster Education Association or otherwise interfere with the rights of the employes represented by the Lancaster Education Association by making unilateral changes in said School Board policies or any other School Board policies which pertain to wages, hours and working conditions of employes represented by the Lancaster Education Association without first notifying the Lancaster Education Association of the proposed change and offering to bargain and, if requested, bargaining with the Lancaster Education Association concerning the proposed change.

BOARD OF EDUCATION, LANCASTER JOINT SCHOOL DISTRICT NO. 3

By_____
President

Dated this_____day of_____, 1975.

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The pleadings and arguments raise a question as to whether the Respondents have violated a number of provisions of the collective bargaining agreement by (1) unilaterally adopting certain policy revisions without prior notice to the Complainant Association or otherwise affording the Complainant Association the opportunity to bargain concerning said revisions; (2) acting to non-renew Complainant Rich's assistant basketball coach position at the High School; and (3) acting to non-renew Complainant Pahr's coaching positions at the High School and reassigning him to different teaching and co-curricular assignments at the Junior High School. In addition, the pleadings and arguments raise a question of whether the unilateral adoption of said policy revisions constituted a violation of the Respondent's duty to bargain in good faith and interference in violation of Section 111.70 (3)(a)4 and Section 111.70(3)(a)1 of the MERA.

UNILATERAL ADOPTION OF POLICY REVISIONS

The Respondent Board unilaterally adopted policy revisions on two separate policies which the Complainants contend violated the collective bargaining agreement and the Respondent's duty to bargain in good faith. Since the arguments of the parties differ in the case of the two different policies involved, they are treated separately herein. However, the Respondent's argument that the contract clause relied on by the Complainants embodies a clerical error is common to both policy revisions and should be dealt with separately at the outset.

(1) Alleged Clerical Error

Over the objection of the Complainants, the Respondents were allowed to introduce evidence to the effect that the Complainants' original proposal and two subsequent proposals which preceded the incorporation of Article 20 into the 1972-1973 collective bargaining agreement were all worded differently than the wording which was ultimately incorporated into the collective bargaining agreement signed by the parties. It is the Respondent's position, based on documents in its possession, that the last of these three proposals represents the actual wording of Article 20 that was agreed to at the bargaining table.

The Complainant Association's original proposal on the subject of policy revisions read as follows:

> "16. Revisions in Policies Handbook
> Any revision in School Board Policies Handbook shall be mutually agreed upon between the Lancaster School Board and the Lancaster Education Association."

Subsequently, on March 7, 1972, the Complainant Association modified its proposal in that regard to read as follows:

> "Any revision in the School Board Policies Handbook which pertains to wages, hours, and conditions of employment for the professional staff shall be mutually agreed upon between the Lancaster School Board and the Lancaster Education Association."

Finally, on March 28, 1972, the Complainant Association made a third typewritten proposal which read as follows:

"REVISIONS IN POLICIES HANDBOOK

Any revision in the School Board Policies Handbook which pertains to wages, hours, and conditions of employment for the professional staff shall be negotiated between the Lancaster School Board and the Lancaster Education Association.

An original proposal. The words 'mutually agreed upon' have been deleted and the word 'negotiated' has been substituted."

Philip Myott, District Superintendent at the time, acted as the Recorder for the Respondent's negotiating team. Myott, who did not testify at the hearing, had a reputation for being a thorough note-taker and record keeper. In minutes of the March 28, 1972 negotiating meeting which were unilaterally prepared by Myott from his hand-written notes for use by the Respondents and never shown to or approved by the Complainant Association, the following item appears:

"4. We agreed on REVISIONS IN POLICIES BOOK, under date of March 28, 1972, presented by Association which reads as follows:

Any revision in the School Board Policies Handbook which pertains to wages, hours, and conditions of employment for the professional staff shall be negotiated between the Lancaster School Board and the Lancaster Education Association."

At the conclusion of the negotiations, a secretary in Myott's office prepared a draft of the agreement which was intended to accurately reflect what was agreed to in the negotiations. After the Complainant Association's representatives had a chance to review the draft, a final draft was prepared by Myott's secretary for signatures and reproduction.

Iris Dahms, who was chief negotiator for the Complainant Association's bargaining team during the negotiations which preceded both the 1972-1973 agreement and the 1973-1974 agreement and proof read the rough drafts for accuracy, testified unequivocally that the version of Article 20 which appears in those agreements accurately reflects the language which was agreed to by the parties. She specifically denied having agreed to the version that appears in the minutes of the March 28, 1972 meeting prepared by Myott and states that the only version agreed to was that version which subsequently appeared in the typewritten agreement. She did recall that at one of the meetings of the Association, one of the members suggested that the use of the word "handbook" in Article 20 "would not be good for the Association" but was unable to produce a written version of the proposal which eliminated the word "handbook" from the clause in question. Her explanation for the absence of any such written proposal was the fact that in the negotiations, the parties often made verbal proposals and agreements.

Because the Respondents assert, by way of affirmative defense, that the agreement as written inaccurately reflects what the parties agreed to, the burden is on the Respondents to establish by a clear and satisfactory preponderance of the evidence, that such is the case. While it is possible to infer from the documents in the Respondent's possession, that a clerical error was made, such an inference is inappropriate in view of the sworn testimony to the contrary by one of the principal participants in the negotiations. The documents in question only constitute a portion of the proposals and counter-proposals that were exhanged in the course of negotiations. No one

who was a member of the Respondents' bargaining team gave testimony to contradict Dahm's testimony that the version that was agreed to was the version that ultimately appeared in the agreement which was signed. The fact that the Respondents' agents assumed responsibility for incorporating the changes in the collective bargaining agreement supports her testimony in that regard.

Because the Examiner has concluded that Article 20, as it appears in the 1972-1973 and 1973-1974 collective bargaining agreements, accurately reflects what the parties agreed to in 1972, it is unnecessary to consider the Respondent's argument that Article 20 does not place any restrictions on the Respondents with regard to revisions of policy when the Board does not choose to incorporate the policy or policy revisions into its handbook.

(2) Policy on Non-Renewals

On February 18, 1974, the Respondent Board adopted a policy of not providing a statement of reasons in cases involving non-renewal or consideration of non-renewal of contracts. This policy represented a departure from the Respondent's prior practice in that regard. Although the Respondents admit that the policy as worded would appear on its face to apply to employes in the plural, they argue that it was only intended to apply to and actually applied to one administrator, who was covered by the provisions of 118.22 but was not in the bargaining unit represented by the Complainant Association, who was being considered for non-renewal at the time. In support of this argument, the Respondents introduced the non-renewal notice sent to the administrator in question which gave no statement of reasons and the non-renewal notices sent to two teachers subsequent to the adoption of the policy which contained reasons (lack of federal funding and decline in enrollment).

While it is a common human error to generalize from the particular, it would appear unlikely that the policy in question would have been worded in the way that it was, if the Respondent Board had intended to limit the policy to the one employe in question or even to those employes covered by the provisions of Section 118.22 but not represented by the Complainant Association. Had it been intended to be limited to the administrator in question, the Respondent Board no doubt would have adopted a motion that a statement of reasons not be contained in the letter that was being authorized to be sent. On the other hand, if the policy was intended to be limited to employes covered by Section 118.22 but not represented by the Complainant Association, it is even less likely that the motion would have been worded in the manner that it was.

It is true that the Respondent District did provide reasons to two teachers who were non-renewed after the adoption of the policy in question. However, neither of those reasons would appear to be the type which would cause legal consequences of the type that might have prompted the Respondent Board to adopt the policy in the first place. However, even assuming that the Respondent Board adopted a policy that was incorrectly worded and has not and does not intend to apply said policy to employes represented by the Complainant Association, the policy ought to be revised or rescinded to correct what would still be a technical violation of its duty to bargain. 1/

1/ Contrary to the position taken by the Respondents, the policy revision constituted a change in a condition of employment over which it had a mandatory duty to bargain. City of Beloit (School Board), 11831-C (9/74), aff'd. Dane Co. Cir. Ct. (Case Nos. 144-272 and 144-406) 3/75. That duty was not waived by the provisions of the agreement; on the contrary it was reinforced by Article 19 of the agreement.

The Examiner concludes that since the policy which was adopted applies on its face to all employes of the District who are covered by the provisions of 118.22, including the employes represented by the Complainant Association, its unilateral adoption constituted a violation of the Respondent's duty to bargain. This is true even though such a violation may have been technical in the sense that no employe represented by the Complainant Association has been affected by said policy revision to date.

The Respondents allege, by way of affirmative defense, that the Complainant Association failed to file a grievance specifically alleging this violation of the collective bargaining agreement and, citing the case of Stanley-Boyd Area Schools 12504-A (11/74), argue that the Commission ought to dismiss that count of the complaint. The Respondents argue that this violation was grieved since it was "subsumed" by and "inextricably interwoven" with the grievances filed. They further argue that since those grievances were rejected by the Respondents at every stage without giving any reason other than the grievance did not present a grievable issue, it would be inappropriate to apply the exhaustion doctrine in this case.

A simple reading of the grievances which were filed indicates that they do not relate to the Board's action on February 18, 1974. The grievances specifically alleged the Board violated Article 19 by adopting the policy with regard to assistant coaches on March 11, 1974 but make no reference whatsoever to the Board's action on February 18, 1974. Similarly, a review of the policy in question would indicate that it was not "subsumed" by or "inextricably interwoven" with the grievances since it related to the statutory non-renewal procedure under Section 118.22 which does not apply to the termination of co-curricular assignments. 2/

The Board's rejection of the grievances that were filed at the first three steps was based on its erroneous opinion that the matters grieved were not grievable. When Welter advised the Complainants on May 9, 1974 that the grievances could be filed at any step they were consolidated and filed at the fourth step on May 17, 1974. The grievances were subsequently considered by the Respondent Board on two occasions pursuant to step (d) of the procedure and ultimately denied. Such conduct on the part of the Respondent Board cannot be equated with a total rejection of the agreed-to procedure of such a nature to conclude that the Complainant Association should be excused from the requirement that it process an unrelated grievance through the established procedure before processing same with the Commission. 3/

The fact that the Complainant Association has failed to process a grievance regarding the violation in question does not preclude it from making a claim that the conduct also constituted a violation of the Respondent's duty to bargain in good faith. As the Complainants point out in their reply brief, the Commission has never held that a party is precluded from complaining of conduct which would constitute a prohibited practice even in the absence of a collective bargaining agreement, merely because it could have grieved the same conduct under the collective bargaining agreement but failed to do so in a timely manner.

2/ Richards vs. Board of Education, 58 Wis. 2d, 444 (1974).

3/ See e.g. Levi Mews d/b/a Mews Redi-Mix (6683) 3/64, aff'd. 29 Wis. 2d 44 (1965).

(3) Policy on Assistant Coaching Assignments

On March 11, 1974, the Respondent Board adopted a policy to the effect that thereafter assistant coaches would not be appointed out of the building in which they are assigned to teach. This had the immediate effect of making several teachers who were assistant coaches during the 1973-1974 school year, including Rich, ineligible for reappointment as an assistant coach. Subsequently, on March 15, 1974, when the Respondent Board decided to appoint Pahr to a teaching and coaching assignment at the Junior High School, he became ineligible for reappointment as an assistant track coach at the High School because of this policy. At the March 15, 1974 meeting, both Pahr and Rich had their assistant coaching positions at the High School deleted. Subsequently, on June 12, 1974, said policy was rescinded. However, as the testimony of the Respondent's Superintendent made quite clear, the Respondent Board did not intend by such action to change its "philosophy" with regard to restricting the assignment of assistant coaches to the building in which they taught. The apparent motivation for rescinding the policy was to convert a written policy into an unwritten policy in an effort to avoid the Respondent's duty to bargain with regard to said policy revision.

The Respondents do not deny that they adopted and later rescinded the policy with regard to the assignment of assistant coaches unilaterally without first offering to bargain or bargaining with the Complainant Association. The Respondents contend that they have the inherent right or managerial prerogative to make or change assignments of the type in question and that such right is reflected in the third numbered paragraph of the management rights provision of the collective bargaining agreement.

As the Respondents admit, the rights reflected in the management rights provision are limited by the other terms of the agreement and the provisions of the MERA. The decision to limit the assignment of assistant coaches to the building in which they teach was a revision of a school board policy which pertained to wages, hours and conditions of employment. It had an immediate impact on both the wages and working conditions of Rich and others and a delayed impact on Pahr's wages and working conditions when he was reassigned to teach at the Junior High School for unrelated reasons. For this reason, the Examiner concludes that the unilateral adoption of the policy in question violated the Respondents' duty to bargain and its obligations under Article 19 of the collective bargaining agreement.

If the action of the Respondent Board on June 12, 1974, had been undertaken for the purpose of repealing the policy, it might be interpreted as an effort to remedy its prior breach of Article 19 by granting the relief which the Complainant Association had specifically asked for in paragraph two of its consolidated grievance. To that extent, the prior violation would be moot as the Respondents argue. However, as the testimony of Welter makes clear, it was apparently undertaken as a stratagem to attempt to avoid the legal consequences of its prior action without actually undoing what had been done. Such conduct constitutes evidence of subjective bad faith and supports a finding of an independent violation of its duty to bargain under Section 111.70(3)(a)4.

At the conclusion of their case in chief, the Complainants were allowed, over the Respondents' objection, to amend their complaint to allege that the Board's unilateral action on March 11, 1974 and June 12, 1974 without "consulting the professional staff" also constituted a violation of paragraph (3) of the management rights section of the agreement. The Respondents renewed this objection in their brief on the claim that the alleged violation had never been the subject of a grievance.

The claim that the Respondents violated paragraph (3) of the management rights clause by failing to consult with the professional staff before adopting the policy regarding the assignment of assistant coaches, is, to use the Complainants' phrase, "inextricably interwoven" with the grievances that were filed. Had the Respondents provided the Complainants with detailed answers to the grievances indicating their reliance on the provisions of paragraph (3) of the management rights section, the Complainants might very well have raised the question of the applicability of the counsultation language contained in that paragraph to the grievances in question. The requirement that a party first exhaust the grievance procedure before seeking a determination by the Commission as to whether the contract has been violated is not intended to preclude either party from raising a question with regard to the proper application of various contract terms which might support their position on a grievance which has actually been filed.

However, the Complainants reliance on the language in question seems misplaced. As the Respondents point out, the word "consulted" refers back to "policies for the program of instruction". Reading the two provisions together, it is clear that the Respondents are under an obligation to negotiate with the Complainant Association on policies which pertain to wages, hours and conditions of employment; whereas, they are only under an obligation to consult with the professional staff on policies for the program of instruction. Since the Examiner has concluded that the policy in question was one which pertains to wages hours and conditions of employment, the Respondent violated the requirement that it first negotiate with the Complainant Association rather than the requirement that it consult the professional staff when it revised the policy in question on March 11, 1974.

NON-RENEWAL OF RICH'S ASSISTANT COACHING POSITION

The non-renewal of Rich's assistant basketball coaching assignment was the direct result of the application of the Board policy which was adopted on March 11, 1974 in violation of the Respondents' duty to bargain and its obligations under Article 19 of the collective bargaining agreement. Contrary to the Complainant's suggestion, the record will not support a finding that the Respondents had other, undisclosed, reasons for terminating his assistant coaching position.

If the Respondents had complied with their obligation to bargain concerning the change of policy which resulted in the non-renewal of Rich's assistant coaching assignment, it might be possible for the Respondents to justify, i.e., show that they had "just cause" within the meaning of Article 20 to reduce his rank and compensation. Had his reassignment been pursuant to a lawful agreement reached with the Complainant Association, it certainly would have had "just cause". On the other hand, if this reassignment had been undertaken unilaterally after making a good faith effort to reach agreement with the Complainant Association and reaching an impasse, it would be necessary to consider whether such reassignment was for "just cause". 4/

The Respondents argue that the protections of Article 20 do not extend to the grievants because the language therein refers to "teachers" and should be interpreted, like Section 118.22 of the Wisconsin Statutes was in the Richards case, 5/ not to cover teachers when they are performing co-curricular assignments. Such a narrow

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4/ There was considerable conflict in testimony as to what extent, if any, the Junior High and Senior High principals believed the prior practice was posing a problem in their respective schools.

5/ See footnote 2, supra.

interpretation of the words employed is unjustified in view of the fact that the collective bargaining agreement, unlike Section 118.22 of the Wisconsin Statutes, is intended to govern all of the wages, hours and working conditions, including the co-curricular salary schedule, for teachers in the employ of the Respondent District. The word "teacher" appears throughout the agreement; had the parties intended to use the word "teacher" in Article 20 in the special sense now urged by the Respondents, it is reasonable to assume that they would have used language to make such intent manifest. Similarly, the Respondents' claim that Rich (and Pahr) suffered no reduction in rank or compensation is based on a special construction of the words employed which is unjustified. Although Rich would have earned more money in the 1974-1975 school year than he did in the 1973-1974 school year if he had not quit his employment, due to scheduled and negotiated increases, the fact remains that he was deprived of his rank as assistant basketball coach and the compensation that accompanied that rank.

Since the Respondents reduced Rich's proposed rank and compensation for 1974-1975 school year pursuant to a policy that was adopted in violation of its obligations under Article 19, the Examiner is satisfied that they did not have "just cause" under Article 20 to do so. However, a serious question arises as to what remedy is appropriate in view of Rich's subsequent resignation.

The Respondents argue that since Rich resigned, his grievance is moot. The Complainants argue that Rich's resignation was in reality a "constructive discharge". According to the Complainants, his grievance is not only viable, but he should be granted the right to reinstatement and otherwise made whole.

When an employer, in an effort to terminate an employe, tells the employe he will be fired if he does not resign or makes working conditions so unbearable so as to provoke the employe into quitting, it is possible to say that the employe was "constructively discharged". Here, there is no evidence the Respondent was seeking to terminate Rich's employment. On the contrary, the evidence discloses that the Respondents' superintendent had no criticism of Rich's teaching or coaching duties. His individual teaching contract had been renewed shortly before he resigned and Welter indicated that he would recommend his reintstatement if he decided to change his mind.

Because Rich chose to resign his employment, and did so before he had actually suffered any financial loss as a result of the Respondent's wrongful termination of his assistant coaching assignment, it would appear that he is not entitled to any individual relief. This is true regardless of whether it is concluded that he earned more or less in his new position than he would have earned had he not chosen to resign.

NON-RENEWAL OF PAHR'S COACHING ASSIGNMENTS

The non-renewal of Pahr's head football coaching assignment and his related reassignment to the Junior High School teaching staff were the direct result of the Respondent Board's judgments regarding his abilities as a football coach. The Board apparently concluded, for reasons which were conveyed in general terms, but never specified for purposes of a hearing under Article 16 of the agreement, that Pahr was not doing a good job as head football coach.

Although Pahr had some general idea of those aspects of his coaching performance with which some members of the Respondent Board were dissatisfied, he was never afforded the rights spelled out in the penultimate paragraph of Article 16, because the Respondent Board took the position at the hearing on June 27, 1974 (and at the private

conference on May 3, 1974) that it had the right to make such a reassignment without regard to the provisions of Articles 16, 19 and 20. Pahr was reduced both in rank and compensation, pursuant to a procedure that violated his rights under Article 16. On this basis alone, it cannot be said that the Respondent had "just cause" to reduce his rank and compensation. Because the reasons were never specified and the Respondents offered no evidence in support of the reasons it may have had, it is not possible to tell if the Respondents would otherwise have had "just cause" to reduce Pahr in rank and compensation if they had not violated his rights under Article 16.

Like Rich, Pahr's loss of his assistant coaching position at the High School would appear to be the result of the policy adopted at the Respondent Board's March 11, 1974 meeting rather than any judgment about his abilities as an assistant track coach. However, unlike Rich, Pahr continued to work for the Respondent District at the lower rank and compensation and should be reinstated to his former rank and made whole for the earnings that he lost in the interim.

Pahr was reduced in compensation because he earned $500 less in 1974-1975 than he would have earned if his co-curricular assignments had not been changed. Had his co-curricular assignments not been changed he would have earned total compensation in the amount of $11,997 consisting of $10,947 for his teaching, $750 for his co-curricular assignment as head football coach and $300 for his co-curricular assignment as assistant track coach. In fact, he earned total compensation of $11,497 consisting of $10,947 for his teaching, $250 for his position as assistant athletic director and $300 for his position as Junior High track coach.

For the above and foregoing reasons, the Examiner has found that the Respondents violated their duty to bargain in good faith by unilaterally adopting the policy of not providing a statement of reasons in cases involving non-renewal or consideration of non-renewal of contracts; that the Respondents violated both their duty to bargain in good faith and their obligations under Article 19 of the collective bargaining agreement by unilaterally adopting the policy restricting the assignment of assistant coaches to the building in which they teach; that the Respondents bargained in bad faith by formally rescinding said policy when their true intent was to continue to apply said policy; that the Respondents violated Article 20 of the agreement by reducing Rich in rank and compensation pursuant to a policy which was adopted in violation of Article 19 of the agreement; and that the Respondents violated Articles 16 and 20 when they reduced Pahr in rank and compensation without affording him a hearing as contemplated by Article 16 and pursuant to a policy which was adopted in violation of Article 19 of the agreement.

Dated at Madison, Wisconsin this 26th day of June, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
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